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March 22, 2017

Chairman Ajit Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of Ex parte Presentation Concerning the Telephone Consumer Protection Act

Dear Office of Chairman Ajit Pai:

On Tuesday, March 21, 2017, Deputy Chief Advocacy Officer & Senior Counsel Regulatory & Executive Branch Relations Elizabeth Eurgubian, and Senior Directors of Advocacy and Counsel Leah Dempsey and Andy Price of Credit Union National Association (CUNA) met with Zenji Nakazawa, who is the Chief, Policy Division, Public Safety and Homeland Security Bureau at Federal Communications Commission Counsel at the Federal Communications Commission (FCC) to discuss concerns surrounding the Telephone Consumer Protection Act. CUNA represents America's credit unions and their more than 100 million members.

During the meeting, CUNA outlined some of the onerous requirements in the FCC's July 2015 TCPA Omnibus Declaratory Ruling and Order (Order), which are making it very difficult for credit unions of all sizes to communicate with members on their cellphone and via text message, and exposing them to the potential of frivolous class action litigation.

They highlighted problems surrounding:

- The overly broad definition of what is considered an autodialer
- Unclear guidance about how a consumer can revoke consent
- Unclear guidance about calling reassigned numbers
- Problems with requiring free-to-end user calls

During the meeting, the different structure of credit unions including member-ownership was discussed, noting that class action litigation results in members essentially suing themselves. CUNA also discussed how consumers are actually being harmed by the confusing July 2015 TCPA guidance, which has led to members not receiving information they want and need. They further noted that credit union members expect and want to hear from their credit union when an action concerning their account arises. CUNA also highlighted that the Consumer Financial

Protection Bureau (CFPB) and other regulators have actually encouraged credit unions to be in more frequent communication with consumers on their cellphones.

Specifically, CUNA reiterated the following points outlined in a previous comment letter to the FCC.

Credit Unions Need Relief from the Onerous July 2015 TCPA Order

The July 2015 TCPA Order continues to limit credit unions' ability to communicate with members about important information such as fraud, data breaches, and other account updates. As soon as it was released, credit unions were sent into a state of disarray about how they could instantaneously comply with a document that is well over 100 pages filled with technical language and unclear nuances. While the July 2015 TCPA Order purported to recognize the importance of communications between financial institutions and consumers, and provided certain exemptions, as noted, the ruling in practicality creates obstacles to credit unions' ability to communicate with their members. The impossibility of complying with the July 2015 TCPA Order has caused many credit unions, particularly smaller ones, to cease using any calling device that could potentially be considered an autodialer altogether and in some instances to stop sending the text message updates that members previously relied on.

Surely when passing the TCPA decades ago, Congress did not intend to arbitrarily scrutinize and limit communications between credit unions, which are not-for-profit, member-owned financial cooperatives, and their members. The July 2015 TCPA Order has not only restricted important communications, but has attracted the attention of law firms seeking to profit from frivolous class action litigation and the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. Frivolous class action litigation has proven costly and detrimental to the mission of credit unions to serve their members and provide the best products and service offerings at competitive rates.

The Exemption for Financial Institutions Provides Minimal Relief

In the July 2015 TCPA Order, the importance of receiving information from financial institutions was recognized. An exemption was provided for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.

However, the conditions that must be met for a call to qualify as exempt are difficult, if not impossible, for credit unions to meet. The July 2015 TCPA Order requires the exempted calls be free-to-end-user calls, or in other words, there can be no charge of any kind to the consumer. This requirement places an unreasonable burden on financial institutions to ensure that notifications do not count against a recipient's plan for minutes or texts. The technology and resources to be able to administer this are not readily available to the majority of credit unions, particularly smaller credit unions.

Other conditions to qualify for this exemption apply as well. For example, a credit union (1) must initiate no more than three messages (whether by voice call or text message) per “event” over a three-day period for an affected account; (2) must offer recipients within each message an easy means to opt out of future messages; and (3) must honor opt-out requests immediately. The technicalities associated with each of these requirements creates many unanswered questions. For example, it is unclear what constitutes an “event.”

Additionally, the exemption only allows calls and text messages to be sent to wireless numbers provided by the customer of the financial institution. An example of a problem with this is that it could preclude another member of a family with a different number, but who is impacted by the account update, from being allowed to receive a call about it.

These are just a few examples of problems associated with the conditions to qualify for the exemption for financial institutions.

The Expansion of What is Considered an Autodialer is Problematic

Another concerning aspect of the July 2015 TCPA Order is the expansion of what is considered an autodialer. Clarification on this is important for credit unions because if they are making informational calls using an autodialer to a consumer’s cellular phone, they need either oral or written prior express consent. Notably, dissenting FCC Chairman Ajit Pai expressed concern that the language about what are considered an autodialer used in the July 2015 TCPA Order is so expansive that it could cause a device like a smartphone or a tablet to now be considered an autodialer. Currently, credit unions and others are not able to interpret from the July 2015 TCPA Order whether the calling system they use subjects them to the TCPA. As a result, some credit unions have decided they cannot bear the compliance risk of contacting consumers on their cell phones, which has limited important communications. Since the TCPA was enacted more than two decades ago, it is nearly impossible that Congress intended for the TCPA to apply to such a broad scope of calling devices. We urge the FCC to provide much needed clarification in this area, and to more narrowly define what is considered an autodialer.

Other Issues that Could Stifle Communication with Credit Union Members

Additionally, the FCC creates ambiguity about how consumers can revoke their consent for all autodialed calls stating that it can be done at any time and in any reasonable manner. This onerous language is problematic since consent could be revoked in almost any manner, including through oral conversations with an employee at any level of a credit union. Since it is not clear what is a “reasonable” way of revoking consent, credit unions theoretically have to monitor and document all communications in every manner with every member and every employee. This could be particularly problematic for credit unions who are proud of the fact they have employees at all levels who know their members and have longstanding relationships with them.

Furthermore, similar to the new requirements for calls made under the Budget Act exemption, the July 2015 TCPA Order increases the possibility of being liable under the TCPA when calling a reassigned number that the credit union has previously been given consent to call. The July 2015 TCPA Order also says that callers can make only one call under a safe harbor before they

are considered to have actual or constructive knowledge that the number was reassigned. The one-call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The July 2015 TCPA Order indicates it does not matter whether the phone call is answered, the caller is still considered to be on notice. For credit unions serving working families who may switch jobs, move, or simply can no longer afford one type of wireless carrier plan over another, it makes no sense to penalize either the credit union or a member seeking information, because of a different number.

CFPB Statements Have Conflicted with the FCC's July 2015 TCPA Order

Other federal regulators and consumer groups share CUNA's views about the benefits of communicating with consumers on their cell phones. According to Pew Research Center, around 64 percent of American adults own smartphones, up 29 percent in just four years. Among the Americans who have smartphones, 10 percent said they do not have broadband access at home and 15 said they have limited online options beyond their mobile devices.¹ Mobile technology is often the preferred method of communication for consumers, and for many younger and lower-income consumers it may be their only method to receive communications. This is also the same demographic of consumers that can benefit the most when credit unions are able to intervene early to provide financial education or counseling. The CFPB, in particular, appears to recognize this benefit of increased communication and has publicly urged credit unions and other financial institutions to use new technology to communicate with consumers.

If you have questions concerning our *ex parte* presentation, please feel free to contact me.

Sincerely,

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